UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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VEKUII RUKORO ET AL.,

Plaintiffs,

v. 17 CV 62 (LTS)

FEDERAL RUPUBLIC OF GERMANY,

Defendant.

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New York, N.Y.
July 31, 2018
10:00 a.m.

Before:

HON. LAURA TAYLOR SWAIN,

District Judge

APPEARANCES

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ALSO PRESENT: Professor Richard Weisberg, Cardozo School of Law

(Case called)

THE COURT: Good morning. Please be seated, everyone.

Give me just a moment please.

(Pause)

THE COURT: Again, good morning.

We are here today for oral argument in the motion to dismiss the complaint in the matter of Rukoro against Federal Republic of Germany.

Counsel, would you please introduce yourselves by way of stating your appearances.

MR. HARRIS: Jeffrey Harris and Walter Diercks, for the Federal Republic of Germany.

THE COURT: Good morning, Mr. Harris.

And good morning, Mr. Diercks.

MR. MCCALLION: Good morning, your Honor.

Kenneth McCallion, for the plaintiffs. And we're rejoined by Michael Lockman who was on the case originally, took a federal clerkship for a year and is back with our firm.

THE COURT: Good morning, Mr. McCallion and Mr. Lockman.

MR. LOCKMAN: Good morning.

MR. MCCALLION: Tom Holman.

THE COURT: Good morning, Mr. Holman.

MR. MCCALLION: Megan Glibowski.

THE COURT: Good morning, Ms. Glibowski.

MR. MCCALLION: And Professor Richard Weisberg, of Cardozo.

THE COURT: Good morning, Professor Weisberg.

MR. MCCALLION: And Arthur Berkle.

THE COURT: Good morning, Mr. Berkle?

MR. BERKLE: "Berkle".

THE COURT: Good morning, Mr. Berkle.

And greetings as well to the distinguished representatives of the Ovaherero and Nama peoples who here today and all other spectators and members of the press.

MR. MCCALLION: Thank you.

All of the named plaintiffs are here, Paramount Chief Rukoro, Chief Isaack and Barnabas Veraa Katuuo.

THE COURT: Good morning.

Thank you for coming to court today.

I understand that the movants, the defendants, have reserved five minutes for rebuttal and so the principle remarks for the defense will be allotted 15 minutes, and then the plaintiffs in opposition will be allotted 20 minutes, and then we will return to defense counsel for five minutes of argument.

We have a device up on the podium that will be set for the allotted time and count down and goes red at the end.

Mr. Lockman will be quite familiar with those from his work in the appellate court.

Is there anything by way of discussion that we need to

cover before we begin the argument?

MR. HARRIS: Not from us, your Honor.

MR. MCCALLION: I don't believe so, your Honor.

THE COURT: All right. Then, Mr. Harris.

MR. HARRIS: Good morning, your Honor.

THE COURT: Good morning.

MR. HARRIS: May it please the Court, we have moved to dismiss this case on the basis that jurisdiction here is claimed under an exception to the Foreign Sovereign Immunities Act. That exception is the so-called Expropriation Exception.

And with regard to a sovereign, as opposed to an agency or instrumentality of a sovereign, among the requirements for the exception to apply and jurisdiction to be granted, there has to be a taking of violation of International law. And the portion that I would like to focus on initially is the next portion which states that the property taken or property exchanged for the taken property, must be present in the United States in connection with commercial activity being carried on by the foreign sovereign in the United States.

And the first question that I'd like to address is, what is the pleading standard that is required for a plaintiffs to successfully plead that portion of the exception? And the Supreme Court last term addressed this issue in Venezuela v. Helmerich, and that involved a D.C. Circuit case. And at the time that case came to the Supreme Court, the D.C. Circuit had

a bifurcated approach as to what you had to plead under this exception. And you either had to plea, your pleading had to be either plausible or not frivolous.

And what the Supreme Court said in the Venezuela case was that that bifurcated standard doesn't, is incorrect, that there is only one pleading standard. And in that case they then went on to announce what they declared to be the standard. And it is neither the frivolous nor the plausible. What they said is that the facts must show and not argue -- just arguably show that you meet the standard.

So they basically said the old bifurcated standard D.C. was using no longer applies and the new standard is that the facts must show and not just arguably show that you meet the standard.

THE COURT: Now that case was decided in the context of a controversy as to whether the plaintiffs had demonstrated that there had been a taking in violation of International law. I don't believe the Supreme Court spoke to any of the other aspects of the Takings Exception. So what basis should I extrapolate or read the announcement of this standard to apply to anything other than that core question of a claim associated with a taking in violation of International law?

MR. HARRIS: Well, that was the question that the court was considering, the taking violation of International law. But the opinion does say, it goes on to say that to

establish jurisdiction under the FSIA and it doesn't limit it to just that particular element.

And subsequent to that case -- just to fast forward a little bit -- the D.C. Circuit in a case called "Owens" had occasion to consider that because in the district court in the Owens case they had applied the prior standard. And that was a case dealing not with the Appropriation Exception but with the Terrorism Exception to FSIA. And when the case came to the D.C. Circuit they said that since the district court opinion had been issued before Venezuela v. Helmerich, that that standard no longer applied, that that standard had been overruled by the Supreme Court and that the standard now and to assert FSIA jurisdiction and it didn't limit it. Now we are in a different exception to FSIA to the Terrorism Exception, that you had to -- what they read the Helmerich case as saying that you had to prove the facts of jurisdiction. So the Owens case did not limit it to the Appropriation Exception and certainly, didn't further limit it to just one element of the Appropriation Exception.

Also, if you think about it, your Honor, the notion that if you have to prove or you have to assert in jurisdiction four elements and they were going to have a different pleading standard for each of the elements, I certainly don't know of any place in our law where you get to plead a different standard depending on which element you are asserting of a

cause of action and I don't think that's what the Supreme Court did. It certainly appeared not to do it in the Helmerich case.

So I would assert to you that the holding in Helmerich as interpreted by Owens, the D.C. Circuit makes it clear that the standard to be applied to assert jurisdiction under FSIA regardless of what exception you are asserting is the standard that Judge Breyer set out that you must show and not just arguably show the facts that support your jurisdictional claim. So I believe that's the standard that you should apply in this case.

Now, with regard to the element that you should apply it to, the question about whether property, the property taken or property exchange for that property is present in the United States. What the plaintiffs allege is that property was taken in the 1880 to 1910 period. It was converted into cash. Although, they don't say how but they allege that. It was put into the German treasury and that today we fast forward to more than a hundred years later and there are four buildings in New York that are owned by the Federal Republic of Germany and somehow some of that money taken in the 1880s is present in those buildings.

So what they assert is that tracing is a proper method and we agree with that. Where we disagree with the plaintiffs is that they haven't traced it. They just simply say that. They simply say that in 1880 they took our livestock. They did

this. They did that. They took minerals. They turned it into cash. It went into the German treasury and now we have on 51st Street and First Avenue the Consulate of Germany, and some of that money you should find is present in the United States in some portion of that building.

Now, if you think about that, if that were the case that a foreign government that took property from someone and is now, there's now a claim against them and they owned property in the United States, that somehow the fungibility argument says that that is enough for you to find that that element of the Expropriation Exception is satisfied. If that were the case about, FSIA would mean nothing because there would be a finding that the property exchange for the taken property is present in the United States. Almost every foreign country owns a piece of property in the United States. So I guess --

THE COURT: You reject the proposition as a legal interpretation of the concept of tracing or the effective commingling as opposed to a factual question of whether it's possible that any proceeds or fruits of the taken property are still somehow a part of the wealth of the Federal Republic of Germany?

MR. HARRIS: No. As a legal proposition I don't argue with the idea of tracing. What I'm saying is that this pleading doesn't do the tracing sufficiently. All it does is

repeat the element that is set out in the federal statute. They just say it, that the property is present in the property exchange for the taken property is present in the United States and here are four buildings in New York that Germany owns. And I would argue to you that that is not sufficient.

For example, there are two intervening world wars in which Germany was absolutely bankrupt. So, if we're claiming some of the funds that were taken in 1880 still existed in the coffers of Germany so that they could be invested in the consulate that was built at the UN, I would say to you that that is simply not true. And where they argue tracing they haven't done the tracing or alleged the tracing in sufficient factual detail to allow you to find that that tracing has occurred.

THE COURT: And what are the burdens of production and persuasion in connection with this point? Is it sufficient for the plaintiffs to come forward with a sufficient allegation? And then is it Germany's job at the end of the day to persuade the Court that this exception does not apply? Or does plaintiff have to prove that it applies?

MR. HARRIS: And that's where we are circle back to Venezuela v. Helmerich. The burden of the plaintiff in the pleading is to show facts, quote, as Judge Breyer said and not just arguably show facts that support the allegation that in this case money that was exchanged for the taken money is

present in the United States.

If it were enough to simply say that in 1800 Country "X" took money. They deposited it into their treasury. Country "X" now has an embassy in the United States and therefore under the tracing theory, that's a sufficient pleading. About the only country that I can think of that would get the benefit of FSIA if that's the way we interpret it would be North Korea who doesn't own any property here, I think. Because just about every country on earth owns property in the United States.

THE COURT: Well, in the Hungarian cases which dealt with the bank and with the railroad which are a little bit different but even so, the defense said well, there's been a war. The allies seized the gold train. There were all sorts of calls on the assets of these institutions and so it's possible that the money is no longer there. But the Court held that at the pleading stage the allegation that the money was still within the bank and within the railroad were proceeds of property, was sufficient to go forward.

So, why is your invocation of world wars and possible bankruptcy different from that scenario where the Court acknowledged possibilities but said that wasn't enough to --

MR. HARRIS: I think those cases were pre-Venezuela v. Helmerich and I think those cases are either interpreted under the nonfrivolous or plausible standard and the Court said none

of those apply.

Let me just move ahead because I don't want to run out of time. I want to talk about the Political Question Doctrine for a moment. One of the things that the Court is seeking is to have you order the German government to require the clients, the plaintiffs, a seat at bilateral negotiations between Germany and Namibia over reparations, so to speak, or what is the subject matter of this lawsuit.

THE COURT: Is that even something that would be within the scope of the Takings Exception?

MR. HARRIS: I don't think it is. But nevertheless, that's exactly what they ask you for in paragraph. In the Prayer for Relief Sub B, they ask you to enjoin and restrain the defendant from continuing to exclude the plaintiffs and other lawful representatives of the Ovaherero and Nama people from participation in discussions and negotiations regarding the subject matter of this lawsuit.

I don't believe that with all due respect, that a U.S. District judge ought to be ordering foreign governments as to who can sit at a negotiation table having nothing to do with the United States. Furthermore, even if you, even if that was something that was in the power of the Court, the problem is it is the lawful Namibian government that gets to decide who sits on their negotiations, not the German government.

So I just think that that is emblematic of the

problems and that you should abstain from this case under the Political Question Doctrine and let the bilateral negotiations between these two sovereigns proceed to settle this problem.

THE COURT: Thank you.

MR. MCCALLION: May it please the Court, starting with the last issue raised, I am rather puzzled. The Political Question Doctrine, Mr. Harris seems to be asserting certain rights of Namibia. Well, Namibia must be well aware of this particular case. They have not chosen to intervene or participate. The U.S. Government must be well aware of this case as well. They have not sought to take a position, intervene and so forth. And there is no case that we know of where the U.S. Government has not taken a position that the political doctrine has been invoked to divest a plaintiff of jurisdiction in a particular court.

Also, Mr. Harris was very careful to point out the, perhaps, the last point of the relief that we're seeking, the bulk of the case and the thrust of the case are damage claims, and those damage claims have nothing to do with current negotiations. We believe under the indigenous UN charter resolution and convention that we should participate and I don't want to say that it's the tail of the dog. It's a very important issue but the thrust of our case are damage claims under the FSIA.

THE COURT: And what is your position as to the basis

for avoiding sovereign immunity with respect to that claim of relief? Is there an exception from the FSIA that would allow the Court to exercise a power to order a foreign sovereign to negotiate with anybody in particular?

MR. MCCALLION: Yes. It's under the equitable power of the Court. Certainly, it's a violation of International law. It's not the heart of the case which I'd like to discuss but it is a violation of International law to violate the rights of indigenous people and also points out that the violations by Germany are really of a continuing nature and come you to the present time. These are not just historical issues that we're discussing but deal with certainly the rights of the plaintiffs at this present time.

With regard to the Court's equitable power of remedies, it's very broad. That issue wasn't specifically briefed but certainly, it meets the elements of the FSIA requirements and the exception, except the violation of International law would be based upon the indigenous, the rights of indigenous people under the UN charter as opposed to the other violations of law given rise to plaintiff's damage claims.

Now, as the Court correctly pointed out, by the way, the Second Circuit has spoken to the issue, on the issue of burden which your Honor discussed with Mr. Harris. And certainly, it has been held, and we briefed this, that Blue

Ridge Investors v. Argentina, Second Circuit in 2013, made it very clear that the ultimate burden of persuasion here remains with the alleged foreign sovereign. And we would respectfully the suggest that we have certainly met our burden of raising certainly, nonfrivolous plausible and indeed, proving to a significant extent our particular case with regard to the violations of International law here such that the burden would then be shifted back to the sovereign, in this case Germany, which it has failed to show.

As your Honor knows, we've submitted extensive documentation and exhibits and declarations from experts and fact witness. This matter was investigated heavily by the plaintiffs. We have put forward that evidence to the Court and we believe it shows certainly sufficiently, if not conclusively that there were significant violations of International law and that the fruits of those violations of International law are found here in New York.

THE COURT: And so I hope that you will speak further to your commingling doctrine argument which seems to me to be extraordinarily broad and perhaps broad enough to vitiate the language of the Takings Exception which speaks in terms of property to a certain extent the same language as the commercial activity exception and then it looks to property used in connection with commercial activity, this exchange of property. But if all property of the sovereign once it has

committed a violation of International law that involves the taking of property and converting it to cash, it then all property, of any sovereign is in some fractional measure the proceeds of the violation of International law, why bother to look to see whether it's used in connection with commercial activity why trace at all?

So, please help me to understand the principle that you are applying here.

MR. MCCALLION: Yes, your Honor.

First of all, putting the issue just in context which I'd like to get to it, not only, it's just not an issue of exchange property but we believe directly we have established that the fruits of the genocide here, the violation of International law are in New York in the form of the skulls and human remains at the American Museum of Natural History.

THE COURT: In your complaint you allege that those were sold by the survivor of an individual who maintained a private collection. And I think some of the documentation that's been proffered said that it was a gift. And so even if one accepts that those are, that that property is here, how have you connected it with the commercial activity of Germany in this country?

MR. MCCALLION: Yes, your Honor.

First of all, we've submitted documentation to your Honor which we obtained from the American Museum of Natural

History after we filed the complaint, which frankly at the time we thought that these bones and the remains came from a private collection. However, as we've submitted to the Court now and if I may, for example, the exception record for those products -- this is document 45-2 -- show that the documents specifically came from the Museum of Ethnology in Berlin. Felix von Luschan was the director of that. The Museum of Volkerkunde in Berlin is the Museum of Ethnology, and von Luschan was the director of that.

So the documentation that we're submitted shows really overwhelmingly that the bones, the collection came directly from the museum of which the director was -- and this is the Imperial Museum of Ethnology owned by Germans, run by Germans and with von Luschan as the director.

Now, if you look around the middle page you see the number 41,500.

THE COURT: Yes.

MR. MCCALLION: That was an amount that was paid. The only way this was a gift was that Felix Warburg whose name appears at the top of page was a New York philanthropist associated with the museum who provided the money and then gifted it to the museum. Now, it's not necessary that this be actually a commercial transaction but it is and we presented evidence of that.

THE COURT: So how is it a commercial transaction if

Warburg paid somebody for it or paid the museum for it but gifted it to the Museum of Natural History?

MR. MCCALLION: Well, if I may, I'd like to refer to 28 U.S.C. 1603 Subsection E, which we'd like to emphasize actually defines commercial activity. It defines commercial activity carried on in the United States by foreign state means commercial activity carried on by such state and having substantial contact in the United States.

There is no requirement in this definition -- and this is 1605(A)(3) that the commercial activity be carried on specifically, by Germany in this country merely, requires commercial activity carried on by the state which has a substantial contact with the United States.

Now, as we argued in our papers, the primary commercial activity that was engaged in by Germany was in the business of bones and eugenics which was a very big business at that particular time. What we have --

THE COURT: Business in what sense? Was it horrible? It was development of these theories upon which government policies were predicated. It was the basis of science that is not respected. But how is it business?

MR. MCCALLION: Well, it was a very big business for Germany through von Luschan and many other agents. It would purchase the bones. In fact, one of the documents that we submitted was actually on the skull of one of the victims of

genocide. This is particularly nominal which the German's derogatorily referred to as "the hottentot". There were 20 reichs marks written on there and also in the related papers of von Luschan was paid for the collection of it. Von Luschan then collected five thousand skulls and human remains ended up in New York, but many thousand more in Berlin that were actually purchased and then sold. So there was a market in bones. It was primarily engaged in by private parties.

But Germany took a step out of its sovereign status and engaged in this commercial activity and became the preeminent really market maker and market participant in this bone trade. It's not just the sale of the bones but the research relating to the Carnegie Institute, for example, in New York, Cold Spring Harbor, the eugenics Institute certainly made a big business of it and worked closely with the American Museum of Natural History which tried to become a player and did become a major player in this particular business of bone display.

Von Luschan described this museum collection and its display in Berlin as one of the major sightseeing attractions in Berlin and the museum itself still remains a major attraction. So there are thousands of bones in New York, thousands of bones in Berlin and the sale of them and the sale of the research relating to them phrenology, eugenics largely discounted at this point was a major commercial activity at

this time.

So you don't look to necessarily the purpose of the transaction but the actual nature, commercial nature of the transaction itself. And for example, part of the purchase here was of specific information and research by von Luschan here in New York. For example, you have Skull 2793 here. Von Luschan took very specific notes relating to these documents. These measurements were then transposed and published and became the source of published materials, the fruits. So the fruits of the genocide, the fruits of this commercial activity were not just in the sale of bones but also in information and calculations relating to them.

So we'd like to emphasize that the commercial activity engaged in by the foreign state was primarily in this particular business and only came about because of the basic violations of International law engaged in by Germany. Germany has admitted those violations of International law on a number of occasions. And actually, it's somewhat surprising that in this case they deny their culpability and responsibility for it.

So I can understand why Mr. Harris would not like to discuss the violations of International law. But as we set forth in our papers, there are numerous occasions where German officials have admitted that what happened to the Ovaherero and Nama, the horrific treatment, the genocide which resulted in

the extermination of between 50 and 80 percent of the Ovaherero and Nama and then the subjugation of them and the enslavement and the expropriation laws, Germany has admitted this.

Mr. Harris in Germany in this case obviously, is trying to walk that back. They're denying that there's been an admission but we have established again and again starting on August 16, 2004, on the 100th anniversary of the genocide Germany's minister for economic development at the time specifically admitted that we Germans accept our historical and moral responsibility and guilt incurred by the Germans at this time. The atrocities committed at that time would be termed "genocide". Later on the Foreign Office admitted it.

The German government was then asked by the press, is this true what the German foreign Office is saying, admitting that this was a genocide? And they say, yes, this reflects the official position of the federal government. Even the current president of Germany, Frank-Walter Steinmeier, acknowledges Germany's responsibilities for its actions which amounted to a war of annihilation and constitutes a war crime and genocide.

We would like to specifically suggest to the Court that the Supreme Court in Venezuela v. Helmerich certainly focused exclusively on the International law violation because that is the crux of the Foreign Sovereign Immunities Act, which adopted the restricted view of sovereign immunity, namely, that once you look at whether the sovereign engaged in an

International law violation or not, if they have, they have taken themselves, really stripped themselves of their right to assert that sovereign immunity defense.

So that is the heart of this particular exception and that's why the Court focused on it.

THE COURT: Well, that was also what was in controversy in the cases that came to that Court. But why should there be any different standard for the other statutory elements of this exception from the general rule of sovereign immunity?

MR. MCCALLION: Well, certainly, I believe we meet either standard. So it's somewhat academic. But certainly, once you established a horrific clear violation that's admitted by the sovereign we would respectfully suggest that after that we have put forth sufficient evidence that the Court would give some latitude if there's some question as to the extent to which this violation of International law had a direct effect on the United States.

We have certainly alleged, they've submitted no declarations of experts. We've submitted declarations of, for example, Stand v. Smith, an economist, expert economist who has set forth an economic opinion and said that it's accepted economic theory regarding the fungibility of assets that while you can trace dollar for dollar, certainly, to the extent that there was a forfeiture of property here, an expropriation not

only of land, cattle, other assets, the use of the proceeds of slave labor, the renting and leasing out of human beings for slave labor which benefited Germany, that once those proceeds went to Germany and certainly, there are substantial savings since they had slave labors working on infrastructure projects, railway projects as well, that that substantial benefit certainly, not only gave the German treasury money but certainly saved them millions upon millions of dollars that once you have that although, you can't trace it Deutsche mark or dollar for dollar that that benefit certainly can be traced to an economic theory, as well as in a legal theory to the use of proceeds by the German treasury and the purchase of buildings here in New York.

THE COURT: Now, you are over your allotted time. So would you mind summing up briefly.

MR. MCCALLION: Sure. I would like to mention the other exception which we allege and we believe we allege it had clearly in our jurisdictional section, paragraph 33, which is the commercial activity section. And this is the other prong which we are relying upon jurisdiction. And here it's even clearer that when the action is based upon an act outside the territory which would be the International law of violation and commercial activity in the trade of bones. The United States in connection with a commercial activity of the foreign state elsewhere don't need the commercial activity here. And the act

causes a direct effect in the United States. So it's a different analysis than that under the 83 prong or the Takings Exception which we believe we meet. But certainly, the direct effect on the United States, the sale of bones, the sale of human remains in New York, the activities of the German service which owns property on First Avenue --

THE COURT: Are you saying that the damage claim is based on the fact of bone sales? Or isn't the damage claim arising from the murders and the taking of skeletons in the first place and so the case law with respect to direct effects looks at the place of contract breach, the place of a tort, the place of the killing and the, essentially, the accrual of a claim in connection with that sort of activity as the direct effect and other effects as more tangential or derivative. And so what is the -- are you saying that the trade in bones is itself a violation of International law or is somehow an independent basis of this action? Or I thought the genocide was basis of the action.

MR. MCCALLION: Well, the genocide is the act outside of the territory. However --

THE COURT: So you have to show a direct effect of that genocide in the United States.

MR. MCCALLION: Yes. The bones and the von Luschan collection would not be in New York but for the fact that the skulls of victims were then cleaned and boiled, went to Berlin

and then ended up in New York. This was a major acquisition by the museum. And also the German service which was formed in 1923 to support eugenics is housed at the First Avenue property owned by Germany. So that was a direct effect. In other words, this, the genocide and the fruits of that directly the human bodies and remains -- what more direct impact could be connected to the genocides than that -- found their way to New York and as part of that commercial activity.

THE COURT: Thank you.

MR. MCCALLION: Thank you very much. On behalf of the plaintiffs respectfully request that the Court deny Germany's motion to dismiss. And we also touched upon it but we would believe that there is a basis for further jurisdictional research or discovery which could take place. We've only had limited access to the von Luschan collection at the museum. We have not had access, for example, to his focus and study materials which were part of it.

THE COURT: Thank you, Mr. McCallion.

MR. MCCALLION: And we would respectfully request an opportunity to further discovery on that issue.

Thank you, your Honor.

THE COURT: Thank you, Mr. McCallion.

Good morning again, Mr. Harris.

MR. HARRIS: Good morning, your Honor, once again.

I would submit, if you look at the amended complaint

that this paragraph 33, it certainly does not allege in the commercial activity exception, the first sentence of it, that is a belated interpretation that really isn't in the complaint. Paragraph 33 says the Court has subject matter jurisdiction under 28 U.S.C. 1330(A) and personal jurisdiction over the defendant under 1330(B), in that the defendant is a foreign state and the Takings Exception to jurisdictional immunity applies. That's what that paragraph alleges.

This belated commercial activity section argument which appears for the first time in their opposition to our motion to dismiss, I would say to you, is not a fair reading of the pleading. So I would call that to the Court's attention.

THE COURT: There is, it's at best say an inartful pleading but the final line of that paragraph does say that there's jurisdiction because the action is in part based on acts in Germany in connection with commercial activities elsewhere that has caused a direct effect in the United States picking up some of language of the A2 exemption. But I do understand your procedural argument and you have a response to the argument, the substance of the argument that that exception applies.

MR. HARRIS: And if you go to the rest of the 96 pages you will never see it referred to again. There is no further pleadings with regard to that.

As to the pleadings that are actually in the

complaint, I would call the Court's attention to paragraph 258 which is the portion of the complaint that deals with this so-called tracing. And it reads:

A portion of the defendant's enormous wealth is attributable to, in exchange for and can be traced from the property it took from the Ovaherero and Nama people in violation of International law. Defendant has invested its wealth worldwide and particularly, large investments in the city and state of New York. Defendants investments in New York constitute property exchanged for property taken in violation of International law in which were derived from a portion of the defendant's commingled funds.

And I would suggest to you that that is the extent of the pleading with regard to this, quote, tracing argument and that really, what that is if you look at the statute and look at this language, is just a paraphrase of the statute. So I do not think that that satisfied it.

I'd like to now move on to the skulls. No where in the complaint did it alleged that the skulls are the property that's in the United States. It is this paragraph 258 which is the exclusive place which you will find the allegations regarding property in the United States.

And with regard to the skulls, as your Honor points out, the skulls were a gift from a private citizen in 1924. And the question of -- so I don't even think we have we reached

the question of whether the skulls would satisfy the property present in the United States. It was a gift from a private citizen and it is not pled in the complaint. And when we move to dismiss and write our briefs we are guided by what's in the complaint. And to the extent that we hear new kinds of argument at oral argument, we're really at a loss to be able to legally defend our position. We go by the Bible. The Bible is the complaint. That's what we are responding to.

THE COURT: Well, to the extent a motion is directed to the merits of the complaint, certainly, one looks at the four corners of the complaint and matters that are integral to the complaint. Your motion is brought as a motion to dismiss for lack of subject matter jurisdiction. And at the end of the day, if there are factual disputes, then we go outside the complaint and there are supplemental materials that have been proffered and I will grant you that the skull and bone matter arguments have been further developed here during oral argument than they were in the papers but they certainly were developed in the papers as well and the Court is not limited to the four corners of the complaint in determining whether it has subject matter jurisdiction.

So is there any further that you want to proffer on this question of the skulls and bones as a basis for the exercise of subject matter jurisdiction?

MR. HARRIS: Just simply that they were a gift to a

museum by a private German citizen in 1924 and there is no activity being carried on, commercial activity being carried on with regard to those skulls in a museum by the Federal Republic of Germany.

THE COURT: I think that the theory that I heard here in oral argument was that Germany made a commercial sale of the bones, whether it was to Mr. Warburger directly to the museum. And so the bones and skulls came to be here in the United States by virtue of a German commercial transaction and they remain in the United States.

Why isn't that enough? Why does it have to be a current commercial --

MR. HARRIS: Because the commercial transaction first has to be a commercial transaction by the foreign sovereign in the United States, by commercial activity of the foreign sovereign in the United States.

So to the extent that the German, assuming those facts, the German government made a sale of some skulls to a citizen, to Mr. Warburg or whoever and it was subsequently brought by Mr. Warburg to the United States, that commercial activity by Germany was not in the United States.

THE COURT: Is there a factual question? Could they have shipped them to him in the United States? Do we need discovery on that?

MR. HARRIS: I would say to you, your Honor, on this

discovery situation, first of all, I don't think that the skulls, I don't think it's fairly pled that the skulls are the kind of property that give rise to the exception. They are not property present in the United States in connection with commercial activity being carried on by Germany. And let's assume that there was commercial activity in Germany in 1924. I don't believe that satisfies the statute. I think if you look at the statute you will find that a fair reading of it is the commercial activity being referred to is current commercial activity, not historical commercial activity.

THE COURT: Thank you.

And we're going a bit over your time but I also let Mr. McCallion go over his time. So, we'll call it another three minutes that you can go but if you want to hit the high points you should --

MR. HARRIS: I'll do it less than three minutes, your Honor.

I just want to point out one other thing that Justice Breyer says in the opinion of the court in Venezuela v. Helmerich, is that as we've previously stated the Court should decide foreign sovereign immune defenses at the threshold of the action. So I would urge you not to consider jurisdictional discovery. Germany should not be put in this court to any more expense an participation than is absolutely necessary. And I think that the Supreme Court clearly said that.

Lastly, I want to double back to where we started. And you asked me do I think that the Venezuela case is limited to that one element. And I told you I didn't think so. But there's a sentence in the opinion that I think further supports my position. That's where Justice Breyer -- and it's right above the conclusion and it says talking about courts -- sometimes they should not simply look to the existence of a non frivolous argument when they decide whether the requirements of the Expropriation Exception are satisfied. So he's talking about the Expropriation Exception as a unified exception, not element by element.

And I think if you -- I have to say this. I've been reading Supreme Court opinions for a long time. And Justice Breyer's opinion sometimes require reading several times to get the full import. And I think a fair reading of Venezuela v. Helmerich is that they announce a new pleading standard that applies to exceptions under FSIA, not with particularly limited Expropriation Exception and certainly not limited to one element within the Expropriation Exception.

Thank you for your time, your Honor.

THE COURT: Thank you, Mr. Harris.

And thank you, Mr. McCallion, and all counsel.

This has been very helpful to me and I will think carefully on these arguments, as well as the submissions which I've already read thoroughly. I am retaining this matter under

advisement. I would ask that the parties split the cost of ordering an overnight copy of this transcript for my chambers and I will look forward to receiving that. And the ECF system will notify the parties when I have rendered a decision.

Thank you all very much. Keep well and safe travels to those who travel.

We are adjourned.

(Adjourned)